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Wiggin

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Part II.

of y^e. different manners in which
obligations are extinguished, & of y^e.
different finis de non recevoir, or
Prescription against debts.



445^{sup}. Obligations may be extinguished
in different ways, either by real
payment, by consignation ^{by compensation} (or set off)
by confusion, by novation, (or y^e.
acceptance of a new engagement)
by a release of y^e. debt, or by y^e.
extinction of y^e. thing which is due.

Those which have been contracted
under a resolutive condition are
extinguished by y^e. occurrence of
that condition, some by y^e. death of y^e.
debtor or of y^e. creditor.

4458. Real payment is y^e. actual
accomplishment of a thing, which a
person obliges himself to give or to do.

When y^e. obligation is to do something,
y^e. real payment of this obligation
consists in y^e. performance of what y^e.

person has obliged himself to do.

When y^r. obligation is to give something,
y^r. payment is y^r. donation & transferring
y^r. property of that thing

459. ~~When y^r. obligation is to give something,~~ It is essential to
y^r. validity of a payment, that it
be made by a person who is able
to make such transfer. The payment
cannot be valid unless made by y^r.
proprietor of y^r. thing, or with his consent.

460. A payment by y^r. very proprietor
would be inefficacious, if, through
any personal defect, he was incapable
of alienating it.

461. When y^r. payment made by
a person who is not proprietor, or who
is incapable of alienation, is of a sum
of money, or other consumable property,
such property is bona fide consumed
by y^r. creditor, y^r. payment becomes valid.

462. Although y^r. payment would
not be valid, when y^r. property was
not transferred, y^r. creditor, while
he retains y^r. possession, cannot claim
any other payment; he must suffer

an eviction, or offer to restore what he has

any other payment; he must suffer
an eviction, or offer to reston what he has
received to y^e debtor.

463. It is not essential to y^e
validity of y^e payment, that it be
made by y^e debtor, or any person
authorized by him; it may be made
by any person without such authority,
or even in opposition to his orders, provided
it is made in his name, & in his discharge,
& y^e property is effectually transferred;
it is a valid payment, it induces y^e
extinction of y^e obligation, & y^e debtor
is discharged even against his will.

But if y^e payment was not made in
y^e name of y^e real debtor, it would
not be valid.

465. The payment in order to be
valid should be made to y^e creditor,
or to some person deriving a power
from him, or having a quality to
receive it.

466. The term creditor is here
understood to mean, not only y^e
immediate person with whom y^e debtor
has contracted, but his heirs, & all those
succeeding to his interest, even under
a particular title.

When y^e creditor has left several heirs, as each of them becomes creditor merely of that particular part for which he is heir, a valid payment cannot be made to any of y^e heirs of more than his own portion, unless he has been authorized by his coheirs to receive y^e whole.

Any person to whom y^e creditor has transferred his rights, whether by sale, donation, legacy^x, or any other title whatever, becomes y^e creditor, upon notice of y^e transfer being given to y^e debtor, or by y^e debtor assenting to such transfer; & consequently y^e payment to any such person is valid.

(^x But according to y^e law of England, a payment cannot be effectually made to a legatee, without y^e assent of y^e executor)

On y^e contrary, y^e original creditor ceases to have that character upon such notice or assent, & any subsequent payment to him would be nugatory.

408. In order to render y^e payment valid, whether made to y^e creditor, or those succeeding to his rights, y^e person receiving must

have a legal capacity to manage

have a legal capacity to manage his affairs

469. A payment made by a debtor to his creditor, in prejudice of y^e rights of persons by whom y^e debt has been attached, is valid, so far as respects y^e creditor, but not as against y^e persons claiming under y^e attachment, who may compel y^e debtor to pay a second time, provided their suit can in other respects be maintained; leaving y^e debtor to his right of repetition against y^e creditor.

Although a person be under arrest, his debtors may make valid payments to him as long as there is no attachment against y^e debts.

470. A payment to any person authorized by y^e creditor, for his behalf, is considered as a payment to y^e creditor himself, & consequently is as valid as if it had been made to him.

471. From this rule it follows:
1st That y^e quality or situation of y^e person authorized to receive is immaterial; notwithstanding he may be either a minor or a monk, y^e payment is valid.

472. - 2ndly - That a payment may be made to a person authorized not only by y^r. creditor, but also by any person having y^r. quality of receiving on his account.

473. 3rdly A payment made to a person, authorized by y^r. very creditor, is no further valid than if it had been made to y^r. creditor himself.

474. A payment to a person under an authority to receive, is only valid if made during y^r. continuance of his authority.

475. An authority ceases by y^r. death of y^r. creditor, or by a change of condition, as, if y^r. creditor is a woman who afterwards marries - consequently, a payment to y^r. person having such authority, after it is revoked by death or a change of condition, would be void. But if y^r. death or change of situation were unknown to y^r. debtor at y^r. time of payment, his making such a payment bona fide would be valid.

477. It is immaterial to y^r. validity of y^r. payment, whether y^r. authority

be special, or a general authority,
omnium negotiorum.

The power of execution which is held
by y. officer, who is employed by y.
creditor to execute it is equivalent to
a power to receive y. debt; & y. discharge
which he gives to y. debtor is as valid
as if it had been given by y. creditor
himself. It is otherwise with respect
to a procurator ad lites, whom I have
authorized to institute a suit against
my debtor; y. procurator is not supposed
to include a power to receive y. debt.

(In England, payment to an attorney em-
ployed to bring an action is sufficient).

478. A payment to those whom y.
law invests with a quality to receive,
on behalf of y. creditor, is valid.

479. The mere circumstance of
consanguinity, however near, is not
a sufficient quality to receive.

482. A payment to a person who has
neither quality nor power to receive,
becomes valid, 1st By a subsequent
ratification & approbation by y. creditor

483- 2^d. When y. payment has eventually
turned to y. profit of y. creditor & 3rd. If y. person
to whom payment has been made, becomes

him, or has succeeded to any other title
of y. creditor.

494. Regularly, a payment can
only be made of y. thing due; & a debtor
cannot oblige his creditor to accept of
any other thing, in lieu of what he owes him.

495. If y. creditor, by mistake,
receives some other thing, upon a
supposition of that being y. thing which
is actually due, y. payment would
not be valid, & y. creditor may, upon
offering to return what he has so received,
demand what is really due.

497. Agreements for paying any thing
else in lieu of what is due, are always
presumed to be made in favor of y.
debtor; therefore, y. debtor has
always a right to pay y. thing which
is actually due, & y. creditor cannot
demand any thing else.

498. Although a debt be divisible,
if it is not actually divided, y. creditor
is not obliged to receive what is due
to him in parts.

499. When several persons have
jointly contracted to pay a debt, all are
obliged to pay the whole.

499. When several persons have become sureties for a debtor, although they have among themselves y^e benefit of division, yet if y^e creditor does not proceed against them for y^e payment, they cannot separately oblige him to receive y^e payment in part.

A judicial demand for y^e creditor to receive his part, by a surety against whom no process has been instituted, or to discharge him from y^e obligation, cannot be supported, however long a time may have elapsed since entering into his obligation; for y^e surety is only entitled to y^e actio mandati, to be discharged from his undertaking, & this against y^e principal debtor, for whom he has engaged, & not against y^e creditor.

503. A person who is creditor of another for different debts, is obliged to receive a payment offered by y^e debtor of any one, although he does not offer y^e payment of y^e others at y^e same time.

504. The payment of a thing can only be made by transferring to y: creditor y: inmovable property of it.

508. When a debt is of a certain & determinate thing, that thing may be effectually given in payment, in whatever state it may happen to be, provided y: deteriorations subsequent to y: contract have not arisen from y: fault of y: debtor, or of persons for whom he is responsible.

509. It is otherwise when y: debt is of an indeterminate thing.

512. When there is a place appointed by y: agreement for y: payment, it ought to be made there. If no place is appointed, & y: debt is of a specific thing, y: payment should be made where y: thing is.

513. If y: debt is not of a specific thing, but of any thing indeterminate, payment should be made at y: place where it is demanded, ubi petitur; that is to say, at the domicile of y: debtor.

From these principles it follows, that when they have not assigned a

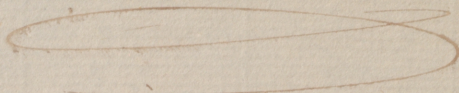
place for payment or agreement

place for payment of agreement
ought to be interpreted in a manner
of least burthen some & expensive to
y^r debtor.

514. Payment is made at y^r expense
of y^r debtor; therefore, if he desires an
acquittance before a notary, y^r acquit-
tance should be passed at his expense.

515. The effect of a payment is to
extinguish y^r obligation & every thing
accessary to it, & to liberate all y^r debtors
of it.

524. Regularly payment of a
part of what is due extinguishes y^r
debt as to that part; therefore, if you
owe me ten pounds, & pay me five, y^r
debt is extinguished for a moiety.



Rules for y^e application or imputation
of Payments.

1st Rule.

528. The debtor has y^e power of
declaring on account of what debt he
intends to apply y^e sum which he pays.

2^d Rule.

529. If y^e debtor, at y^e time of paying,
makes no application, y^e creditor to
whom money is due for different causes,
may make y^e application by y^e ac-
count which he gives.

It is requisite - 1st That this application be
made at y^e instant. 2^d That it be equitable.

3^d Rule.

530. When y^e application has neither
been made by y^e debtor nor by y^e creditor,
it ought to be made to that debt which y^e
debtor at y^e time had y^e most interest
to discharge.

Corollary 1. The application should
rather be made to a debt which is not
contested, than to one that is; rather to a
debt which was due at y^e time of payment,
than to one which was not.

Ch. 2^d - Among several debts which are

Cor. 2.^d— Among several debts which are due, y^r application ought rather to be made to y^e debt for which y^e debtor was liable to be imprisoned, than to debts merely civil, in respect of which process could only issue against his effects.

Cor. 3.^d— Among civil debts y^r application should rather be made to those which produce interest, than to those which do not.

Cor. 4.th— The application ought rather to be made to an hypothecatory debt than to another.

Cor. 5.th— The application ought rather to be made to y^e debt for which y^e debtor had given securities, than to those which he owed singly.

Cor. 6.th— The application ought rather to be made for a debt, of which y^e person who has paid was principal debtor, than to those which he owed as surety for other persons.

All these corollaries may be subject to exceptions, which are left to y^r discretion of y^e judge.

4.th Rule.

§31. If y^e debts are of an equal nature, & such that y^e debtor had no interest

in acquitting one rather than y^e other,
y^e application should be made to that
of y^e longest standing.

5th Rule.

532.

If y^e different debts are of y^e same
date, & in other respects equal, y^e appli-
cation should be made proportionately
to each.

6th Rule

533.

In debts which are of a nature
to produce interest, y^e application is
made to y^e interest before y^e principal.

535.

When y^e creditor pays himself
out of y^e price of a thing which was
hypothecated to him, & which he has
sold, y^e application is to be directed by
other rules than those above established.

1st rule — The application ought in this
case to be made rather to y^e debt for
which y^e thing was hypothecated, than
to others for which ~~it~~ ^{the thing} was not,
wherever interest y^e debtor may have
had to acquit y^e former rather than y^e latter.

When *y.* debt for which *y.* thing was hypothecated carries interest, *y.* creditor may make *y.* application to *y.* interest, before *y.* principal.

2^d Rule. When *y.* thing was charged as a security for different debts, *y.* application is made to that whose right of hypothecation is strongest; for instance, to a privileged debt rather than to a simple hypothecation. Among simple hypothecations, *y.* application will be made to *y.* debt of which *y.* hypothecation was *y.* most ancient. If *y.* rights of hypothecation were equal, *y.* application should be made to all by contribution, pro modo debiti.

536. Consignation is a deposit which a debtor makes of *y.* thing that he owes into *y.* hands of a third person, under *y.* authority of a court of justice.

537. Consignation is not properly a payment, for a payment essentially includes a transfer of property in *y.*

thing which is paid; whereas it is evident
that a consignation does not transfer
y^e thing consigned to y^e creditor, who can
only acquire a property by voluntarily
receiving it, *Dominium non acquiritur
nisi corpore et animo*. But all things

y^e consignation made upon y^e refusal
of y^e creditor is not an actual payment,
it is equivalent to a payment, &
extinguishes y^e debt no less than if
an actual payment had been made.

538. To render y^e consignation valid
& equivalent to a payment it is
necessary, *qu'il n'ait pas tenu au
debiteur de payer au créancier*, &
that y^e creditor should be placed
en demeure, by an effectual offer of
payment.

An offer, to be effectual, must be made
to y^e creditor himself, if ^{he} has a capacity
of receiving; if not, to y^e person who has
y^e quality of receiving on his behalf, as
his tutor, or curator &c.

539. 2^d. It must be made by a
person capable of paying.

540. 3^d The offer must be of y^e entire sum, unless a liberty is expressly given of paying by instalments.

541. 4th When y^e debt is contracted under a condition, y^e condition must have taken place, & if there is any term stipulated in favor of y^e creditor, that term must have expired.

542. 5th The offer must be made at y^e place appointed for y^e payment.

543. A formal act must be prepared of these proceedings, & of y^e summons before a judge, for y^e purpose of directing a consignation. The summons is to appear immediately & y^e judge thereupon directs a consignation, ~~affixing~~ a requiring y^e creditor to be present at such consignation, at a time & place particularly specified.

544. Such a consignation ought to be made at y^e time & place indicated, & of y^e entire sum due unless there is a special provision for paying it up by parts.

545. The effect of a consignation, if it is adjudged to be valid, is that y^r debtor is thereby absolutely discharged.

546. A Novation is a substitution of a new debt for an old.

The old debt is extinguished by y^r new one contracted in its stead, for which reason, a novation is included amongst y^r different modes in which obligations are extinguished.

(It is a settled principle in y^r law of England, that a mere agreement to substitute any other thing in lieu of y^r original obligation is void, unless actually carried into execution, & accepted as satisfaction. No action can be maintained upon y^r new agreement, nor can y^r agreement be pleaded as a bar to y^r original demand.)

547. A novation may be made in three different ways, which form three different kinds of novations. The first takes place, without y^r intervention of any new person, where a debtor contracts a new engagement

with his creditor, in consideration of being liberated from y^e former. This kind is called a novation generally.

548. The second is that which takes place by y^e intervention of a new debtor, when another person becomes a debtor in my stead, & is accepted by y^e creditor, who thereupon discharges me from it. This kind of novation is called ex promissio.

549. The third kind of novation takes place by y^e intervention of a new creditor, when a debtor, for y^e purpose of being discharged from his original creditor, by y^e order of that creditor, contracts some obligation in favor of a new creditor.

550. It results from y^e definition which has been given, that there can be no novation without two debts being contracted, one of which is extinguished by y^e substitution of y^e other. It follows that if y^e debt, of which it is proposed to make a novation by another engagement,

is conditional, & y^e novation cannot take effect until y^e condition is accomplished.

555. Only those to whom a valid payment may be made, can make a novation of a debt.

559. In order to constitute a novation, y^e consent of y^e creditor, or of some person having authority from him, or a quality to make a novation for him, is requisite.

562. A novation made with y^e intervention of a new debtor, may be made between y^e creditor & y^e new debtor, without y^e first, whose debt is to be thereby extinguished, concurring in it, or consenting to it.

563. The effect of a novation is, that y^e former debt is extinguished in y^e same manner as it would be by a real payment.

From y^e principle that a novation extinguishes y^e ancient debt, it

follows also that it extinguishes
y: hypothecations which are
accessory to it. But y: creditor
may, by y: very act which contains
y: novation, transfer to y: second
debtor y: hypothecations which were
attached to y: first.

514. Delegation is a kind
of novation, by which y: original
debtor, in order to be liberated
from his creditor, gives him a
third person, who becomes obliged
in his stead to y: creditor, or to y:
person appointed by him.

It results from this definition, that
a delegation is made by y: concurrence
of three parties, & that there may be a
fourth. There must be a concurrence
1st, of y: party delegating, that is, the
ancient debtor who procures another
debtor in his stead.

2^d, of y: party delegated, who enters into
an obligation, in y: stead of y: ancient
debtor, either to y: creditor or some

other person appointed by him.

3^d If y. creditor, who, in case of payment of y. obligation contracted by y. party delegated, discharges y. party delegating.

Sometimes there intervenes a fourth party, viz. y. person indicated by y. creditor, in whose favor y. person delegated becomes obliged, upon y. indication of y. creditor, & by y. order of y. person delegating.

To produce a delegation, y. intention of y. creditor to discharge y. first debtor & to accept of y. second in his stead, must be perfectly evident.

565. A delegation includes a ^{debt from y.} novation, by y. extinction of y. person delegating, & y. obligation contracted in his stead by y. person delegated.

568. Regularly when y. person delegated contracts a valid obligation to y. creditor, y. delegant is entirely liberated, & y. creditor has no recourse against him, in case of y. substitute's insolvency. There is an exception

to this principle, if it is agreed that
y: debtor shall at his own risk
delegate another person.

570. The release which y: creditor
makes of y: debt, is also one of y: modes
in which obligations are extinguished,
for it liberates y: debtor plene jure.

(In England, a release can only be by deed sealed and
delivered. If several persons are jointly & severally bound
in a contract, a release to one operates as a discharge to all

571. All debts, of whatever kind, & in
whatever manner contracted, are exting-
uished, plene jure, by a simple agree-
ment of release between the creditor &
debtor, provided y: creditor is capable
of disposing of his property, & y: debtor is
not a person to whom y: creditor is
prohibited by law from making a donation.

572. A release of a debt may be
~~presumed~~ made, not only by an express
agreement, but also by a tacit agreement
resulting from facts that induce a
presumption to that effect. Thus, if
a creditor has restored to his debtor y:
writing containing y: obligation, he is
presumed to have released y: debt.

574. The substitution of an article pledged does not induce a presumption either of y. release or payment of y. debt, for y. creditor might have no further intention than to remit y. pledge, & not to release y. debt.

575. A creditor is presumed to have released y. solidarity to debtors in solidis, when he has admitted them to pay singly.

We may distinguish two different kinds of releases, y. one we call a real release, y. other a personal discharge.

580. A real release is when y. creditor declares that he considers y. debts acquitted, or when he gives a discharge, as if he had received y. payment of it, although he has not.

581. A personal release or discharge is that, by which y. creditor merely discharges y. debtor from his obligation; such discharge magis eximit personam debitricis ab obligatione, quam extinguit obligationem: it only extinguishes y. debt indirectly, where y. debtor, to whom it is granted, was y. sole

principal debtor, because there can be no debt without a debtor.

But if there are two or more debtors in solida, a discharge to one of them does not extinguish y. debt; it only liberates y. person to whom it is given, & not his codebtor: y. debt is extinguished, however, as to y. part of y. person to whom y. discharge was given, & y. other only remains obliged for y. remainder. A discharge to a principal debtor induces that of his sureties.

583. It is only y. creditor when he has y. power to dispose of his property, or a person having a special authority from him, who can release a debt.

A person having a general procuracy, a tutor, a curator, an administrator, have not this right; for all these persons have only y. power of administering & not of giving; now, a release is a donation.

When there are several creditors in solida, correi credendi, one of them may, without y. others, make a

release of y. debt, & such release
discharges y. debtor from all y. others,
y. same as a real payment.

584. It is evident that y. release of
a debt can only be made to y. debtor;
but, if it is presumed to be made to y.
debtor, whether y. agreement which
contains it is with y. very person of y.
debtor, or with his testator, curator, or other
administrators.

585. When there are several debtors
in solids, y. creditor may by a release
to one of them extinguish y. debt, &
liberate all y. others.

586. A release being a donation, it
is requisite to its validity, that y.
debtor to whom it is made be not a
person to whom y. laws forbid a
donation to be made.

587. Compensation (or set off) is *q.* extinction of debts of which two persons are reciprocally debtors, by *q.* credits of which they are reciprocally creditors. Compensatio est debiti et crediti inter se contributio.

588. Compensation may be opposed against *q.* debts of every thing susceptible of it. The debts of things susceptible of compensation are, debts of a certain sum of money, of a certain quantity of corn, wine, or other consumable things.

The debt of an indeterminate thing of a specific kind, though not consumable, is likewise susceptible of compensation.

On *q.* contrary, where a thing, although in its nature consumable, is due as a specific & determinate object, *q.* debt is not susceptible of compensation.

589. Where *q.* thing due is susceptible of compensation, such a compensation may be opposed from whatever cause *q.* debt proceeds. It may even be opposed against *q.* debt of a sum due by virtue of a judicial condemnation.

Compensation may be opposed, not only against debts due to individuals, but even against debts due to towns, corporations or communities.

590. For a debt to be opposed in compensation, it is necessary, 1st that y^r thing due be of y^r same kind as that which is y^r object of y^r debt, against which y^r compensation is opposed.

591. 2nd The debt opposed by way of compensation must be fully due.

592. 3^o The debt opposed by way of compensation must be liquidated.

A debt is liquidated when it is evident that it is due, & to what amount.

593. 4^o The debt must be determinate.

594. 5^o The debt must be due to y^r very person who opposes it as a compensation.

596. The debt which is opposed as a compensation must be due from y^r same person to whom it is opposed.

599. Compensation is made pleno jure, placuit quod in vicem debitor ipso jure compensare.

When it is said that compensation is made ipso jure, it means that it is made by y^r mere operation of law, without being pronounced by y^r judge, or opposed by y^r parties.

600. The effects of compensation are
1st, That if my creditor, to whom I have
given goods in pledge, becomes my debtor,
I may reclaim y^e goods upon offering
y^e balance, if any, in his favor; y^e com-
pensation of y^e debt due to me being
equivalent to a payment.

2nd If you had a debt due from me
which carried interest, & afterwards
became my debtor of a sum, which from
its nature did not carry interest, my
debt would be held to be discharged
to y^e extent of y^e mutual credit, from
y^e time of such credit taking place,
& interest would only be due for y^e
balance from that time.

601. 3rd Although my creditor is
not bound to receive a real payment
in parcels, (*supra*, n. 498) yet, if he becomes
my debtor for a less sum, he is obliged to
suffer a partial discharge of his debt,
by virtue of y^e compensation.

602. 4th If I were your debtor of
£3000 upon three different accounts,
& afterward become your creditor of
£1000, y^e compensation of my demand
of £1000 ought to be made against that
debt which it is most my interest to acquit.

Of Confusion.

605. By confusion is meant y^e concurrence of two qualities in y^e same subject, which mutually destroy each other.

606. This confusion takes place when y^e creditor becomes heir of his debtor, or vice versa, when y^e debtor becomes heir of y^e creditor. In both these cases y^e qualities of creditor & debtor of y^e same debt become united in y^e same person. The same consequence ensues when y^e creditor succeeds to y^e debtor, by any other title which renders him subject to his debts; Or where y^e debtor succeeds, by whatever means, to y^e right of y^e creditor.

612. In order to induce a confusion of y^e debt, y^e characters not only of debtor & creditor, but of sole debtor & sole creditor, must concur in y^e same person.

§13. There cannot be any debt without something being due, which forms y^r matter & object of y^r obligation; whence it follows, that if that thing is destroyed, as there is no longer any thing to form y^r matter & object of y^r obligation, there can be no longer any obligation. The extinction of y^r thing due, therefore, necessarily induces y^r extinction of y^r obligation.

§15. An obligation becomes extinct, not only when y^r object of it ceases generally to be susceptible of obligation, but also when y^r thing due to me is no longer susceptible of being so, although it may be susceptible of an obligation in favour of another person.

§17. In order to induce y^r extinction of a debt, by y^r creditor becoming proprietor of y^r thing due, it is necessary that he should have acquired a full & absolute property in it; if that is not y^r case, y^r debt subsists, & y^r debtor is bound to do what remains in order to perfect & complete y^r property.

620. There is little difference between a thing being lost, so that it cannot be known where it is, & its having actually ceased to exist. Therefore, if this loss takes place without any fault in y. debtor, y. debtor is liberated as much as if y. thing no longer existed.

621. It is evident that obligations of a certain specific thing are extinguished with y. extinction of that thing. With respect to alternative obligations, they are not extinguished by y. extinction of one of y. things due in y. alternative; but y. obligation, which was before alternative, becomes determinate in respect of y. other which remains.

622. The extinction of obligations by y. extinction of y. thing due, cannot take place with regard to obligations of an indeterminate thing.

624. The extinction of y. thing due extinguishes y. debt, when y. thing is wholly destroyed; if any part remains, y. debt continues to subsist, so far as regards such part.

625. For y. extinction of y. thing

due to extinguish y. debt, it must happen without y. act or fault of y. debtor, & without his having been detained en demeure.

If y. loss happens by y. act of y. debtor, it is evident that y. obligation is not extinct, but is converted into an obligation of y. value. This decision applies even when y. debtor destroys y. thing before he is apprised of y. debt.

§26. If y. loss takes place not precisely by y. act of y. debtor, but in consequence of his default for want of proper care, y. debt is not extinct, but is converted in like manner into an obligation of y. value.

§27. The loss of y. thing due does not extinguish y. obligation when it happens after y. debtor is placed en demeure to give it.

§29. When y. thing due has perished by y. act or fault of y. principal debtor, or after he has been placed en demeure, y. claim for y. value of it subsists, not only against himself & his heirs, but also against his sureties, & in general, against all who have acceded to his obligation.

§30. If y. thing has perished by y. act or fault of y. surety, or after he has been placed en demeure, y. surety alone will be liable for y. value of it; y. principal debtor will be liberated by its extinction.

§31. If y. thing due is lost by y. act or fault of one of y. co debtors in solido, or after he is placed en demeure, y. other codebtors are liable.

§32. If y. thing is lost by act or fault of one of y. heirs of y. debtor, ~~or~~ after his demeure, his co heirs will not be liable.

§34. Where y. extinction of y. thing due is not total, & some part of y. thing remains, y. obligation beyond a doubt subsists as to such residue.

637. Regularly, a claim is not extinguished by y. death of y. creditor, for a person is supposed to stipulate as well for himself as for his heirs, & other universal successors.

Therefore, by y. death of y. creditor y. claim passes to y. persons of his heirs, who succeed to all his rights; & if he has no heirs, it is deemed to rest in y. vacant succession, which, in this respect, personae vicem sustinent defuncti.

In like manner y. obligation is not extinguished by y. death of y. debtor: for we are deemed to engage as well for ourselves as for our heirs & other universal successors. Therefore, when y. debtor dies, y. obligation passes to his heirs, who succeed to all his rights & obligations, & if he leave no heirs, it falls upon y. vacant succession which represents him.

638. A claim for y. reparation of injuries is also extinguished by y. death of y. creditor or person injured, if during his life time, he has not made any complaint or demand in a Court

of Austin; he is presumed in this case to
have forgiven & pardoned y^r. injury.

of bars & prescriptions.

§40. The legal bars to y^r. maintaining
of a claim, (fin de non recevoir contre
les créances), are certain causes which
prevent y^r. creditor from enforcing such
claim in a Court of justice.

The first kind of fin de non recevoir,
is y^r. authority of a legal adjudication,
when y^r. debtor has been judicially
discharged from y^r. claim of his creditor;
there results from this judgment a bar
(fin de non recevoir) against y^r. creditor
which renders him incapable of pur-
suing his claim, unless he invalidates
y^r. sentence upon an appeal, or other-
wise procures it to be rescinded by
y^r. regular course of law. This is y^r. bar
which is called in law, exceptio rei
judicatae.

A second bar is that which results
from y^r. decisory oath of y^r. debtor, who
has sworn that he does not owe any
thing, upon such oath having been
deposited to him by y^r. creditor. There
results from this oath a bar

called exceptio jurisjurandi, which renders y. creditor inadmissible to prosecute his claim, whatever proof he may afterwards have in support of it.

§41. A third fin de non recevoir is that which results from y. lapse of time to which y. law has limited y. action arising from y. claim. This fin de non recevoir is more particularly called a prescription, although prescription is a general term which may also be applied to all other fins de non recevoir.

§42. Fins de non recevoir do not extinguish y. claim, but they render it inefficacious, by depriving y. creditor of his actions to enforce it. And further, although fins de non recevoir do not in veri veritate extinguish y. claim, they induce, so long as they subsist, a presumption that it is extinguished & discharged.

A bar must be opposed by y. debtor; it is not supplied by y. judge. It may be waived by a renunciation of y. debtor, either express or tacit. A bar which is thus waived, can be no longer opposed to y. prosecution of y. claim. There is no way of waiving it more effectually than y. payment of y. debt—

Of Prescriptions of 30 Years.

§43. Regularly, an action upon any claim ought to be instituted within y. term of thirty years: when y. creditor has let this term elapse without commencing his action, y. debtor acquires a prescription, which may be opposed to y. demand.

§44. This prescⁿ is founded, 1st, Upon a presumption of a payment, or release arising from y. length of time. 2^d. It is also established as a punishment for y. negligence of y. creditor.

§45. It follows, that prescription only begins to run from y. time when y. creditor has a right to institute his demand, because no delay can be imputed to him before that time. Hence it is a general maxim with regard to this subject, contra non valentem agere nulla currit prescriptio.

§46. Prescription cannot run against y. claims which a woman, even with a separate property, has against her husband, so long as y. marriage continues, for being under his power, she is prevented from proceeding against him.

A prescription cannot run against a beneficiary heir for y. claims which he has against y. beneficiary succession; for he cannot proceed against himself.

647. Prescription does not run against minors, although they have tutors.

650. The time of prescription runs against a succession, although vacant, abandoned, & without a curator.

651. Prescription takes place even against y. farmers of y. king's revenue, for y. debts dependant on y. right to which they hold in farm.

652. The Presct. of 30 years does not take place against y. church; but ~~in~~ ~~y. case~~ only y. prescription of 40 years.

Secular communities have y. same privilege with y. church, & a prescription cannot be acquired against them under 40 years.

653. The effect of y. trentenary presct. is, that when it is accomplished, y. debtor may, by opposing it to y. claim of y. creditor, obtain a judgment declaring him to be discharged from y. demand.

655. A prescription begun or completed against y. creditor takes effect against his heirs, & other successors, either by an

universal or a particular title, so that they have only y^r. time which remained to y^r. creditor, when they succeeded to him; & if y^r. time had expired against y^r. creditor, y^r. same fin de non recevoir which had attached against him, will continue to subsist against them.

658. The time of prescription is interrupted either by an acknowledgment of y^r. debt, or by a judicial interpellation.

Any act (written instrument) by which y^r. debtor acknowledges y^r. debt, interrupts y^r. time of prescription, whether it be passed with y^r. creditor or without him.

663. When there are several debtors in solidum, y^r. acknowledgment of any one of them, or a judicial interpellation to any one of them, interrupts y^r. prescription with respect to all y^r. others.

It is otherwise with respect to several heirs of y^r. same debtor; an acknowledgment by one, or an interpellation of one, only interrupts y^r. time of prescription with respect to y^r. part for which he is personally y^r. debtor, & does not prevent y^r. prescription of y^r. part due from y^r. others, who has neither acknowledged y^r.

debt, nor received any judicial interpellation; for, a debt may be prescribed as well as extinguished in part. This is y. case even with respect to a debt for which each heir is, by way of hypothecation, liable to y. whole.

The judicial interpellation of one of y. debtors in solido interrupts y. prescrip-
tion not only against y. other debtors, but also against their heirs. In like manner, y. judicial interpellation of y. heir of one of y. debtors in solido interrupts y. prescription against all y. other debtors.

§ 65. A prescription, although accomplished, is destroyed, if y. debtor afterwards acknowledges y. debt, this acknowledgment excludes him from y. fin de non recevoir which resulted from y. accomplishment of y. time of prescription, & consequently destroys & annihilates it.

An acknowledgment made after y. time of prescription is accomplished, so as to revive y. debt, can only be made by y. debtor himself, & must be of full age; it cannot be made by a tutor, a curator, or a person having a general procuration, but only by one having a special procuration for y. particular purpose.

567. A sentence of condemnation, against y. debtor, when it has acquired y. force of res judicata, that is, when it is no longer open to appeal, likewise extinguishes y. prescription; & y. debtor cannot afterward be admitted to oppose y. prescription, even if he has omitted to do so in y. suit upon which y. condemnation intervened, for this condemnation gives y. creditor a new title.

Of y. prescription of 40 Years.

568. An hypothecatory debtor, that is, one who has obliged himself by an act before a notary, cannot oppose y. presc. of 30 years, but only that of forty.

569. The disposition of y. law, Cum Intipium, has only been adopted with respect to hypothecations upon acts passed before notaries. Debtors by judgment have y. benefit of y. ordinary prescription of 30 years, although y. Ord.ⁿ of Moulins gives a right of hypothecation where there is a judgment; for y. law gives this hypothecation rather to y. personal action, ex judicato, than to y. debt upon which y. adjudication is founded. Therefore

g. hypothecation is extinguished by g. same prescription of thirty years as g. personal action.

It is g. same with respect to all other hypothecations given by g. laws, they are extinguished with g. personal action to which they are attached.

671. The mixed (per sonelle réelle) action for seigniorial rents, & similar causes, is also subject to g. ordinary prescⁿ of thirty years.

672. According to g. 126: Article of g. Custom of Paris "tradespeople, & sellers of things by retail, such as bakers, pastry-cooks, butchers, salt-dealers, & g. like, cannot maintain an action after six months from g. "first delivery."

Persons who deal in articles of greater value, such as drapers, mercers, goldsmiths, masons, carpenters, are allowed a year to institute their actions for what is due to them. Apothecaries have also a year Art. 127.

§75. The prescription of one year takes place; 1st Of common right, against y^e demands of tradesmen & artificers, included in y^e 126th Art. of y^e Custom of Paris, & y^e 7th Art. of y^e 1st title of y^e 300th of 1673. 2^d Against demands for y^e fees of physicians, Surgeons, according to y^e 125th Art. of y^e Custom of Paris. 3rd Against y^e demands of schoolmasters, & other instructors of children. 4th For board & provisions. 5th for Wages of servants.

§76. These prescriptions of six months & a year do not take place; 1st When y^e claim is established by any act in writing, whether before a notary or under private signature, or by an allowance at y^e foot of an account, containing y^e charges, or in y^e books of y^e tradesman signed by y^e debtor. In this case y^e claim is only subject to y^e prescription of 30 years.

§77. 2^d When prescriptions do not prevail, if they have been interrupted by a judicial demand, before y^e expiration of y^e time & y^e demand has not been discontinued, this is common

to all prescriptions.

§ 78. 3^o These presc.^{ts} are not observed in consular jurisdictions in cases where goods have been supplied by one tradesman to another, for y. purpose of his business, & y. parties have running accounts in their books.

§ 79. 4th These presc.^{ts} do not run against persons out of business (les Bourgeois) who sell y. produce of their lands; for y. ordonnance as well as y. customs only apply to persons in trade.

§ 80. 5th presc.^{ts} against y. demand of tradesmen & artificers runs from y. day of each article supplied, or each piece of work being done; & a continuation of y. supply or of y. work does not interrupt it.

§ 84. These prescriptions are founded entirely upon y. presumption of payment. Hence it follows, that y. creditor is not so far barred as not to be entitled to defer y. decisory oath to y. debtor, as to whether y. sum demanded be really due or not. Herein these presc.^{ts} differ from others, which, being established

by way of punishment of y^e. creditor,
deprive him entirely of y^e. right of action.

885. Y^e. debtor to whom y^e. oath is
deferred, is obliged to swear that y^e.
sum demanded from him is not due;
in default of his doing so, y^e. oath is
referred back to y^e. plaintiff, & upon
such oath he ought to obtain sentence
of condemnation.

889. The demand of day labourers
for y^e. payment of their hire, is pre-
scribed at y^e. end of 40 days.

This presc^t., as well as y^e. preceding, is
founded upon a presumption of payment;
it is presumed that these kind of persons
who have occasion for their wages for
their support, will not wait longer
without obtaining payment, or at
least demanding it.

Wherefore, this presc^t., like y^e. preceding,
does not preclude y^e. plaintiff from
proffering y^e. oath to y^e. defendant, nor
from proving verbally that y^e. defendant
has offered to pay, if y^e. demand does
not exceed 100 livres.

890. The demand of procureurs for their fees is prescribed at y. and of two years from y. decease of their clients, or y. avocation of their authority.

892. The demand of a party for y. restitution of papers entrusted to an advocate or procureur, is prescribed at y. expiration of 5 years from y. date of y. definitive judgment, or compromise, but y. end of ten years, if y. case is not determined.

893. All these presc. are wholly founded upon y. presumption of payment or satisfaction, & do not prevent deferring y. decisory oath to y. defend^r, as to whether he has actually paid y. money, or retains y. papers.

Part IV.

Of proof of Obligations & their payment.

§44. He who alleges himself to be a creditor of another, is obliged to prove a fact or agreement upon which his claim is founded, when it is contested; on the other hand, when a obligation is proved, a debtor who alleges that he has discharged it is obliged to prove a payment.

There are two kinds of proofs, written & verbal; confession, & certain presumptions are also regarded as equivalent to proofs, as is likewise a oath of a party, in certain cases.

Art. 1. Of literal or written proof

§45. Literal or written proof is that which results from acts or other writings. These acts are authentic or private. Authentic acts are those which are received by a public officer, such as a notary, or register (greffier). Private writings are those which are made without a ministry

of any public officer. These acts are also either original or copies; they are likewise distinguished into primitive titles, & titles of recognition.

Of original authentic titles.

696. Authentic acts are those which are received by a public officer, with y. requisite solemnities.

To induce this quality, y. act must be received in y. place where y. officer has a public character & right of attestation.

699. When y. act is not authentic, whether from y. incompetence or v. interdiction of y. officer, or for want of form, it has, if signed by y. parties, at least y. some credit against y. party signing it as an act under private signature.

700. An original authentic act has in itself full credit as to what is contained in it. Nevertheless, when such act is produced out of y. jurisdiction of y. officer who received it, it is customary to verify y. signature of y. officer by an act of legalisation subjoined to it. This legalisation is an attestation

of y. judge royal of y. place, certifying
that y. officer who has received & signed
y. act is in fact a public officer, notary &c.
701. Authentic acts are entitled to
credit, principally against y. persons
who were parties to them, their heirs, &
those deriving titles ~~from~~ ^{under} them. They
have full credit against such persons
as to all y. operative part of y. act, i. e.,
of every thing which y. parties had in
view, & which constitutes s. object of y. act.

704. The act proves against a third
person, rem ipsoam, i. e. that y. transaction
which it includes has intervened.

But y. act is no proof against a third
person, not party to it, of any thing
which it states by way of enunciation.

Of private writings.

707. There are different kinds of
private writings: acts under common
private signatures; acts taken from
public archives, censive (manorial)
papers & terriers, tradesmen's books,
domestic papers, writings not signed.
The last class have some resemblance to
private writings.

709. Acts under common private signatures have y^e same credit against those who have subscribed them, their heirs or successors, as ~~an~~ authentic acts. But there is this difference between the two, that y^e latter do not require any recognition, whereas y^e creditor cannot, by virtue of any act under a private signature, obtain a condemnation against y^e person subscribing it, his heirs or successors, unless he has previously concluded for y^e recognition of y^e act, & obtained a judgment thereon.

713. When a person acknowledges himself to be debtor & depository of a certain sum, according to y^e particulars specified in y^e margin, y^e sum to which those particulars amount is y^e sum due, although different from that expressed in y^e act; which in such case is an error of calculation.

714. Acts under private signature are no evidence against y^e party subscribing them, when they are in his own possession.

715. Acts under private signature, like authentic acts, are no evidence against third persons, further than to shew that y^e thing contained in y^e act really took place, probatum est ipso facto. But these acts being liable to be antedated, are commonly no evidence against third

persons that what they contain really passed, except from y. day of their being exhibited.

If, however, there was any circumstance to ascertain y. date of y. act, such as y. death of one of y. parties who had subscribed it, this would be evidence, even against third persons, of y. act having been passed previous to such death.

716. The name of public archives is given to repositories of titles established by judicial authority. These repositories being only established for y. preservation of genuine titles, they assure y. truth of those which are found in them. Therefore, acts under private signature, with y. attestation of y. treasurer of y. archives, are entitled to credit, without recognition.

~~714. In books of householdment, in which they insert from day to day y. good and evil, they deliver to different persons, cannot be a full & entire proof of y. goods being supplied against y. persons who are debited for them.~~

717. A person cannot make titles for himself: therefore, acts which are not passed by any public person, such as caveillorats, i.e. registers of y. lord of y.

manor, of y^e estates held under him, & y^e dues & services annually payable to him, do not prove y^e performance of those services, & consequently, are not a sufficient foundation for y^e lord to demand a recognition of them. Never the less, when they are ancient & uniform, they form a semi-proof, which, joined with others, such as y^e acknowledgements of y^e proprietors of y^e neighbouring estates, may sufficiently establish y^e demand of y^e lord.

718. These kinds of papers, which are not authentic, are no proof for y^e lord against other persons; but they are proof for others against him. But when y^e tenant makes use of y^e censive papers against y^e lord, y^e lord may, in his turn, make use of them against him; & in this case, y^e papers of y^e lord are full proof in his favor.

719. The books of tradesmen, in which they insert from day to day y^e goods which they deliver to different persons, cannot be a full & entire proof of y^e goods being supplied, against y^e persons who are debited for them. Nevertheless, it has been established in favor of commerce, that when these books are so regular on y^e face of them that they are written from day to

day, without any blank; when y^r. trades-
man has y^r. reputation of probity, & his
demand is made within a year after
y^r. delivery, they make a semi-proof; &
judges often even decide in favor of y^r.
demands of tradesmen, by admitting
their oath; as supplying y^r. defect of
proof arising from their books.

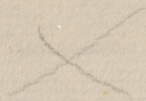
723. There is no question, but that
y^r. books of tradesmen form a complete
proof against them, as well of y^r. agreement,
which they have made, as of y^r. goods and
payments which they have received.

724. What we write in our domestic
papers is no proof in our favor against
any person who has not subscribed them.
In y^r. case of writings which acknowledge
an obligation from myself, if y^r. entry in
my journal, or on my tablets is signed
by me, it is a complete proof of y^r. debt
against myself & my heirs, & if it is not
signed, it is only a semi-proof, which ought
to be fortified by some confirmatory circumstances.

When y^r. entry, although signed, is crossed
out, it is no longer any proof in favor of y^r.
creditor; on y^r. contrary, y^r. circumstance of
its being crossed is a proof that I have
repaid y^r. money, if y^r. creditor has not

any engagement from me in his possession.

725. There are three kinds of private writings not signed; 1. Journals & Tallys; 2. Writings on loose papers; 3. Those which are at y^e foot, in y^e margin, or upon y^e back of signed acc.



730. Tallys are y^e parts of a piece of wood cut in two which two persons use to denote y^e quantity of goods supplied by y^e one to y^e other. For this purpose each of them has one of y^e pieces; that in possession of y^e debtor is properly called y^e tally, & y^e other, y^e echantillon.

When y^e goods are delivered, y^e two pieces are joined together, & a notch is cut in them, denoting y^e quantity supplied.

These tallys are used instead of writings, & are a kind of written proof of y^e quantity supplied, when y^e buyer has y^e echantillon to join to y^e tally.



731. It is a rule common to all copies, that when y^e original title subsists, they are no proof of any thing which is not contained in y^e original.

738. The Copy of a donation which is transcribed in y. register is not evidence of y. donation.

739. If y. insinuation had been made by y. request of y. donor, & he had signed y. register, it would be evidence of y. donation; because, judicial copies, made in y. presence of y. parties, have y. same credit against a party who was present when they were made as originals.

740. Copies not made by any public person, are those which are called absolutely informal; they do not, even if ancient, form any proof, & can at most furnish a very slight inference.

741. It is evident that a copy taken not from y. original, but from a preceding copy, although servato juris ordine, can only be equal proof with that from which it was taken, against y. same persons.

742. The primary title, as y. name implies, is y. first title which has been proposed between y. parties, between whom an obligation has been contracted, & which contains such obligation. Titles of recognition are those which have been

subsequently passed by y: debtors, their heirs, or successors.

743. Recognitions ex certa scientia, or in forma speciali et dispositiva, are those in which y: tenor of y: primary title is set out. These recognitions have y: particular quality of being equivalent to y: original, in case that should be lost.

Recognitions in forma communi are those in which y: tenor of y: original is not set out; these only serve to confirm y: original title, & to stop y: course of prescription.

744. Both kinds of recognition have this in common, that they are relative to a primary title, that y: person making y: recognition, is not considered as thereby contracting any new obligation, but only as acknowledging y: former obligation contracted by y: primary title.

745. In y: same manner as acts are passed for y: proof of engagements, they are also passed for y: proof of payments. These are called acquittances.

An acquittance is evidence against y: creditor who has given it, his heirs, or other successors, whether it were passed before notaries, or under private signature of y: creditor.

Of Parol or Testimonial Evidence.

Parol or testimonial proof is that which is made by y. deposition of witnesses.

750. The ord.ⁿ of 1667 directs that "Acts shall be passed before Notaries, or under private signatures, of every thing exceeding y. value of 100 livres, the proof shall be received by witnesses against or beyond y. contents of acts, even when they relate to a less sum than 100 livres."

In y. succeeding article, y. ordonnance excepts y. case of unforeseen accidents, & cases where there is a commencement of proof by writing.

From these dispositions of y. ordonnance, we may deduce four general principles, which determine y. cases in which parol evidence ought to be received or rejected. These principles are,

1. A party who had it in his power to procure a proof, in writing, is not admitted to give parol evidence, when y. subject exceeds y. value of 100 livres, unless he has a commencement of proof in writing.

2. When there is an act in writing, those who are parties to it, their heirs or successors, cannot be admitted to

give perot evidence against or beyond
such act, even when y: subject does
not exceed 100 lires, unless they have
a commencement of proof in writing.

3. Parol Evidence is admitted of things
whereof y: parties could not procure
a proof in writing, whatever may be y:
value of y: subject.

4. In like manner, when by a fortuitous
~~unexpected~~ event, acknowledged by y: parties,
or proved to have taken place, y: written
proof has been lost, parol evidence may
be admitted, whatever may be y: value.

7/7. A first kind of commencement
of proof, by writing is, when there is
proof against any one by an authentic
act, to which he was party, or by a
private writing, written or signed
with his hand, not of y: whole that is
alleged against him, but of some thing
which leads to it, or makes part of it.

It is left to y: discretion of y: judge
to decide upon y: extent of y: commence-
ment of proof by writing, which shall
be sufficient to admit a proof by
witnesses.

770. A second kind of commencement of proof by writing is, when I have a proof against any one by an authentic writing, to which he was party, or by a private writing signed by him that he was my debtor, but without such writing proving y. sum; this is a commencement of proof by writing, which ought to admit me to prove y. same by witnesses.

771. Private writings not signed form a third kind of commencement of proof, by writing, of what they contain against y. person who has written them.

772. According to y. principles which we have laid down, y. commencement of proof by writing ought to result, either from a public act, to which y. person against whom y. proof is offered was a party, or from a private act, signed, or at least written by him.

An act written by y. party requiring y. proof, cannot serve him as a commencement of proof, because no person can make evidence for himself. From this however we must except y. books of tradesmen, which, when they appear to

be in proper order, are a commencement of proof in favor of those who have written them.

773. The writing of a third person cannot be such a commencement of proof as y. ordinance requires; for such third person is as a witness, & what he has written can only be equivalent to his parol testimony.

782. When a creditor demands permission to prove y. obligation which he alleges any person to have contracted in his favor; & in like manner, when a debtor offers proof of having paid y. money which is demanded from him; if y. proof is admissible, according to y. principles stated in y. preceding articles, y. judge gives an interlocutory sentence, by which he permits y. party to give y. parol evidence that he requires; y. other party being at liberty to prove y. contrary.

This sentence is called an appointment to make inquiries. In execution of y. sentence, y. parties ought within y. term, & according to y. forms prescribed by y. Ord.ⁿ of 1667, tit. 22, to produce y. witnesses & have them examined before y. judge, or a commissioner; & an act is made of their

depositions, which is called an inquest.

783. For y. inquest to be allowed as containing a sufficient proof of y. fact which y. party has undertaken to prove, it is requisite that such fact should be proved by at least two witnesses, whose depositions are valid.

785. For a deposition to be valid it is requisite, 1st, that it should not be defective in point of form—

2nd There must not be any exception against y. person of y. witness.

786. 3rd The deposition should not contain any thing to induce a suspicion of its sincerity.

788. Witnesses produced to prove a fact are not required to have all y. qualities which are necessary in those who are called upon to be present at y. execution of written acts, in order to give them proper solemnity; women, foreigners not naturalized, members of ecclesiastical communities are admitted to depose in judicial examinations.

The causes of exception which may be proposed against a witness, so as to exclude his testimony, may be referred to four heads; want of reason - want of good fame - suspicion of partiality - suspicion of subornation.

789. It is clear, that y^r. depositions, of any infant child, or person of ill of his senses, ought to be rejected.

790. The depositions of those who are rendered infamous by any condemnation ought to be rejected; this is taken for granted by y^r. Ord^r. of 1657, Tit. 23. Art. 2.

791. If suspicion of partiality is a just cause of exception against y^r. deposition of a witness; witnesses, to be worthy of full credit, ought to be entirely disinterested.

Upon this foundation, y^r. depositions are rejected - 1. of those who have any personal interest in y^r. decision of y^r. cause, although they are not parties to it.

792. 2. Of those who are related to or connected with both or either of y^r. parties, as far as y^r. fourth degree of collaterals inclusive.

793. 3. Of servants, or other domestics, of either of y^r. parties.

794 - 4. ^{y^r. vigilance} Of y^r. advocate or procurator of either of y^r. parties ought not to be admitted.

795. 5. If suspicion of partiality is in general a sufficient cause for rejecting y^r.

depositions of witnesses, who are engaged in any process with y. party against whom they are produced.

796. A legitimate suspicion of subornation is also a just cause of exception, for which y. deposition of a witness ought to be rejected.

Confession, Presumption, &c. oaths of y. parties.

Confession is Judiciary or Extrajudiciary.

797. A judiciary confession is y. acknowledgment which a party makes before a judge of a fact on which he is interrogated; of which confession y. judge gives an act, or written memorial.

798. A judiciary confession made by a person capable of being a party in a cause (standi in judicio) is full evidence of y. fact acknowledged, & relieves y. other party from making any proof of it.

801. Extra judiciary confession is that which is not made by any judicial act.

803. A confession can only be evidence against y. person who has made it, if

he has a capacity to oblige himself;
y^e confession of a married woman not
authorized, or a minor, is not any proof.

804. Confession is a proof not only
against y^e person who makes it, but
also against his heirs.

805. A tacit confession ought to
have y^e same effect as one which is express.

806. Presumption may be defined
to be a judgement to which y^e law, or which
an individual makes respecting y^e
truth of one thing, by a consequence
deduced from another thing. These
consequences are founded upon what
commonly & generally takes place.

Presumption differs from proof
properly so called; y^e latter attests
a thing directly & positively; presumption
attests it by a consequence deduced
from another thing.

There are with respect to obligations,
different kinds of presumptions: some are
established by law, & are called presumptions
of law; others not established by any law,
are called simple presumptions: of y^e
presumptions of law, some are called
presumptiones juris et de jure, others

simply presumptions of law, presumptiones
juris.

807. Presumptions juris et de jure are those which are such absolute proof as to exclude all evidence to the contrary.

808. They cannot be destroyed, & the party against whom they operate, is not admitted to prove any thing in opposition to them.

The principal kind of presumption juris et de jure, is that which is founded on the authority of res judicata.

The presumption arising from a decisory oath is also a kind of presumption juris et de jure.

809. Presumptions of law are also established upon some law, or by argument from some law, or legal authority. They are therefore called presumptiones juris. They have the same credit as a proof, & render it unnecessary for the party in whose favor they operate to make any proof of his demand or defence; but they differ from presumptions juris et de jure, since they do not exclude the party, against

whom they militate from being admitted to prove q. contrary; & if he succeeds in doing so, he destroys q. presumption.

Of q. Authority of Res judicata.

(This section not being in q. first edition, is distinguished by a separate series of numbers.)

1. A judgment to have q. authority, or even q. name of res judicata, must be a definitive judgment of condemnation or dismissal.
 2. q. Ord. of 1807, l. 27. Art. 5, specifies three cases in which definitive judgments have q. authority of res judicata. It is then said, "Sentences, & judgments having q. authority of res judicata, are those which are given in q. last resort or not appealed from; those against which an appeal is not receivable, either because q. parties have formally acquiesced, or because q. appeal has not been made within q. limited time, & those q. appeal from which is declared to be extinct."
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5. Arrêts, & judgments in q. last resort, can never be questioned by q. ordinary mode of appeal, but arrêts may be so in certain cases, by q. extraordinary course of requête civile.

6. The Ord.^e of 1667 expresses y^e different cases in which a civile request is admitted, it makes a distinction between minors, & persons of full age, between private individuals, & y^e church.

The causes for which individuals, though of full age, are allowed y^e benefit of a civile request are contained in y^e 34.th Art. of Tit. 35; it is there said - "Persons of full age shall not be allowed y^e benefit of civile request, except in y^e following cases," 1.st Personal fraud.

2.^d If y^e procedure directed by us (viz. y^e King) has not been followed, ~~this is~~.

3.^d If judgment has been given upon things not demanded, or not contested, viz more has been adjudged than was demanded.

4.th If y^e Court has omitted to pronounce respecting any of y^e subjects in demand.

5.th If there is a contrariety between writs or judgments, in y^e last resort between y^e same parties upon y^e same ground, & in y^e same courts or jurisdictions; saving in case of contrariety between different courts or jurisdictions, y^e right of obtaining relief in our grand council.

6. If in one *Op.* same arret, there are contrary dispositions.

7. If judgment has been given upon false writings -

8th Or upon offers or consent which have been disavowed, by disavowal adjudged to be well founded.

9. Or if there are decisive writings newly discovered, kept back by *op.* other side —

8. When *op.* party against whom *op. arret* has been given is entitled to a civile requete in any of *op.* above cases; he ought to institute *op.* new party proceeding for that purpose within six months after *op.* signification of *op. arret*, made subsequent to his obtaining his majority. If he die within that time, his heirs have a new six months from *op.* time of a new signification, if they are minors, *op.* time only runs from a signification after their majority.

(*op.* term arrets is confined to *op.* judgments of *op.* parliaments.)

11. In Ordonnance in enumerating *q.* judgments which have *q.* force of res judicata, & which consequently form *q.* presumption *juris et de jure*, ~~whereof~~ ~~are~~ ~~being~~ mentions in *q.* second plan, those from which an appeal is no longer receivable. It mentions two circumstances, on account of which *q.* appeal can no longer be received, *q.* first is when *q.* parties against whom *q.* judgment has been given have formally acquiesced in it. The Ord. by *q.* term formally, does not mean that in order to exclude *q.* party from his appeal, it is requisite that he should have acquiesced in *q.* judgment in express terms, & have passed an act for *q.* purpose, it only requires that *q.* acquiescence shall be shown in an unequivocal manner.

12. In second cause for which an appeal is no longer receivable, is that *q.* party has suffered *q.* time within which it ought to be made to elapse.

13. According to *q.* principles of *q.* law of France, *q.* party who considers himself injured by a sentence, unless he has done some act importing an acquiescence, or has been summoned to appeal or submit, has ten years, which begin to run from *q.* signification of *q.* sentence. Ordre of 1807, l. 27, art. 17.

Both this period (i.e. 20 years) is allowed by *q.* church, to hospitals, colleges & communities,

in suits relating to their domains, & this time also begins to run from y. signification of sentence.

14. The order places, thirdly, amongst judgments having y. force of res judicata, those from which y. appeal is declared to be lost. An appeal is lost when it has been discontinued for three years, & a judgment has been obtained declaring y. right of preemption to be acquired. This judgment has y. effect of a confirmation of y. sentence appealed against, & gives it y. force of a res judicata, so y. appellant is precluded from renewing his appeal.

Appeals which are not contested may fall into preemption as well as those which are.

15. Although y. time has elapsed, y. preemption is not acquired until there is a judgment declaring it to be so.

16. There is a great difference between a judgment which is null, & one which is improper: a judgment is null when it is not according to y. regular form of proceeding, it is improper when y. judge has made a wrong decision: an improper judgment, given according to y. regular form, may have y. force of res judicata, when it falls within any of y. cases specified in y. Ord. 18th, & however unjust it may really be, it is to be regarded as equitable, & no proof can be admitted to y. contrary. On y. contrary, a judgment which is null, & given

contrary to y^e regular form of procedure,
cannot have y^e authority of res judicata,
at least unless y^e nullity has been cured.

~~A judg^t may~~

18. 1. A judgment is null when y^e
object of y^e condemnation which it pro-
nounces is uncertain

21. 2. A judg^t is null when y^e object
of y^e condemnation is any thing impossible.

22. 3. A judg^t is null when it pronounces
any thing which is expressly contrary to y^e law.

23. 4. A judg^t is null when it contains
inconsistent & contradictory dispositions.

24. 5. A judg^t is null, when it pro-
nounces upon what is not in demand,
or condemns a party to y^e payment of more
than is demanded from him.

25. And in like manner a judg^t is
null when it dismisses y^e defend^t from a
demand in which he has acquiesced.

26. These nullities, which arise from y^e
judg^t having decided upon what was
not submitted to him, do not operate
ipso jure; they ought to be taken advo-
cate of, either by y^e ordinary course of
appeal, when y^e judg^t is not in y^e last
resort, or by civil requests when it is; & when
y^e party has allowed y^e time for these to

slapoe, without impeaching y^e judgment,
y^e nullities are cured.

27. A judgment, to be valid, ought to be given between persons capable of being parties in a judicial proceeding, or as it is expressed, of standing in judgment.

All procedures by, or against, persons incapable of being such parties, as well as y^e judgments founded upon such procedure, are ipso jure void.

28. Persons incapable of being parties are—1st those who have lost their civil state, either by a condemnation to capital punishment, or by religious profession.

29. 2^d Minors who are under y^e authority of a tutor.

30. 3^d Women, under y^e authority of a husband, without being authorized by their husbands, or in case of their refusal, by y^e Court.

35. A judgment may be null in respect of y^e judge by whom it is given, when he was without character, as if he had not been received into his office, if he was under an interdiction, if he was incompetent. The nullity arising from these defects does not operate pleno jure, but must be taken advantage of by appeal to a superior Court.

37. The authority of res judicata induces a presumption that every thing contained in y. judgment is true, & this presumption being juris et de jure, excludes every proof to y. contrary; res judicata pro veritate accipitur.

38. As y. authority of res judicata excludes all proof in contradiction of what has been adjudged; y. party against whom y. judgment has passed, is not allowed to offer evidence that y. judge has fallen into any error of calculation. The authority of res judicata, so completely excludes all proof to y. contrary, that y. party against whom y. judgment has been given, cannot impeach it even by decisive writings which have been since discovered.

40. The authority of res judicata takes effect with regard to y. object of y. judgment.

Therefore a party whose demand has been dismissed, can only be excluded by y. exception rei judicate from making a new demand, if y. object of y. demand is y. same. For this purpose three things must concur;

1st The demand must be of y. same thing; 2^d. It must be for y. same cause; 3^d It must be made in y. same quality.

56. Provided these three things concur, y. authority of res judicata equally attaches, whether y. demand is made in y. same form of action or another.

57. The authority of res judicata only takes place between y. parties to y. judgment, it gives no right to or against third persons.

Of y. oaths of y. parties.

817. There are three principal kinds of oaths which are used in civil suits; 1st The oath which one of y. parties defers or refers back to y. other for y. decision of y. cause, & which is therefore called y. decision oath.

2^d The oath to be taken by a party who is interrogated upon facts & articles.

3^d The oath which y. judge, of his own motion, defers to one of y. parties, either

for y^e decision of y^e cause, or in order
to fix & determine y^e quantity of y^e
condemnation, this is called jura-
mentum judiciale.

819. The decisory oath may be deferred
in any kind of civil context whatever,
in questions of possession, or of claim;
in personal actions, & in real. It can,
however, only be deferred to a party
respecting his own personal acts.

820. The plaintiff may defer y^e oath
to y^e def^t whenever he conceives that
he has not a sufficient proof of y^e fact,
which is y^e foundation of his claim.
And in like manner, y^e def^t may
defer it to y^e pl^t, when he has not a
sufficient proof of his defence.

This oath may be demanded, either
before or after y^e contestation of y^e
cause, upon an appeal, as well as in
y^e original suit.

No commencement of proof is necessary
in order to enable y^e plaintiff to defer
y^e oath.

821. As y^r. decision of y^r. contest, & y^r.
right of y^r. parties is made to depend
upon this oath, it follows, that it can
only be deferred by or to those who
have y^r. disposition of their rights.

822. The person to whom y^r. oath is
deferred, ought either to take it or refer
it back; & if he will not do either, y^r. cause
should be decided against him.

If y^r. fact in question is not y^r. act of
both parties, but only of him to whom y^r.
oath is deferred, he will not have y^r.
option of ~~referring~~^{referring} it back, but is under
an absolute obligation to take y^r. oath
upon pain of losing y^r. cause.

If y^r. party makes y^r. oath required
of him, it will form a presumption
juris et de jure of y^r. truth of what he
has affirmed, & no proof can ever be
received to y^r. contrary.

If he refers y^r. oath back, y^r. party to
whom it is referred will be absolutely
bound to take it, or y^r. cause will be
decided against him; if he does take it,
whatever he affirms will in like manner
be deemed to be conclusively proved; & no
evidence can be admitted to y^r. contrary.

When *q. def.* is *q. party* to whom *q. oath* is deferred, or referred back, his oath that he does not owe what is demanded, gives him an exception, called exceptio juris-jurandi, which entitles him to have *q. demand* dismissed with costs. This exception being founded upon a presumption juris et de jure, excludes *q. p[ar]ty* from giving any evidence that *q. def.* was perjured. He would not even be admitted to make such proof by writings newly discovered.

When it is *q. p[ar]ty* to whom *q. oath* is deferred or referred back, he may at once obtain judgment for payment of his demand with costs, & no defence can be received in opposition to it.

A party who has revoked his demand of *q. oath*, cannot defer it a second time.

825. As a deisory oath is no proof against any other persons than those by whom it was deferred, neither is it any proof, except in favor of *q. person* to whom it has been deferred, & who has taken or been discharged from taking it.

326. When a party signifies facts upon which he obtains an order that the opposite party shall be interrogated by y. judge, y. oath, which is taken upon such interrogatory, is very different from y. decisory oath, for it forms no proof in favor of y. party by whom it is made, but is evidence against him. The reason of y. difference is, that y. person who causes his adversary to be interrogated upon facts & articles, does so, not for y. purpose of having y. cause decided by y. answer, but merely with a view of deducing some proofs, or presumptions, from y. admissions which y. party interrogated may make, or y. contradictions which he may fall into.

328. The oath called juramentum judiciale is that which y. judge, of his own accord, defers to either of y. parties. There are two kinds of it: 1. That which y. judge defers for y. decision of y. cause, & which is understood by y. general name of juramentum judiciale, & is sometimes called y. suppletory oath, juramentum suppletorium. 2. That which

y^e judge defers in order to fix & determine
y^e amount of y^e condemnation that he
ought to pronounce, & which is called
juramentum in litem.

829. To warrant y^e application of y^e
oath which y^e judge defers for y^e decision
of y^e cause, three things must concur:

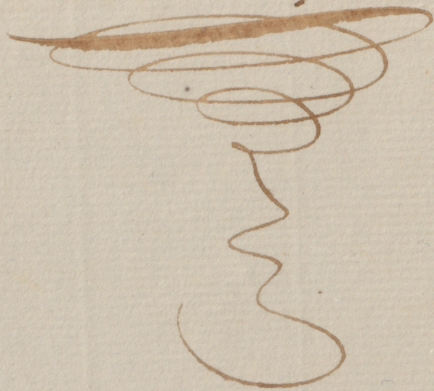
1. The demand, or y^e exceptions, must not
be fully proved. 2. y^e demand, or exceptions,
although not fully proved, must not be
wholly destitute of proof. 3. The judge
must have entered upon y^e cognizance
of y^e cause, to determine whether y^e oath
ought to be deferred, & to which of y^e parties.

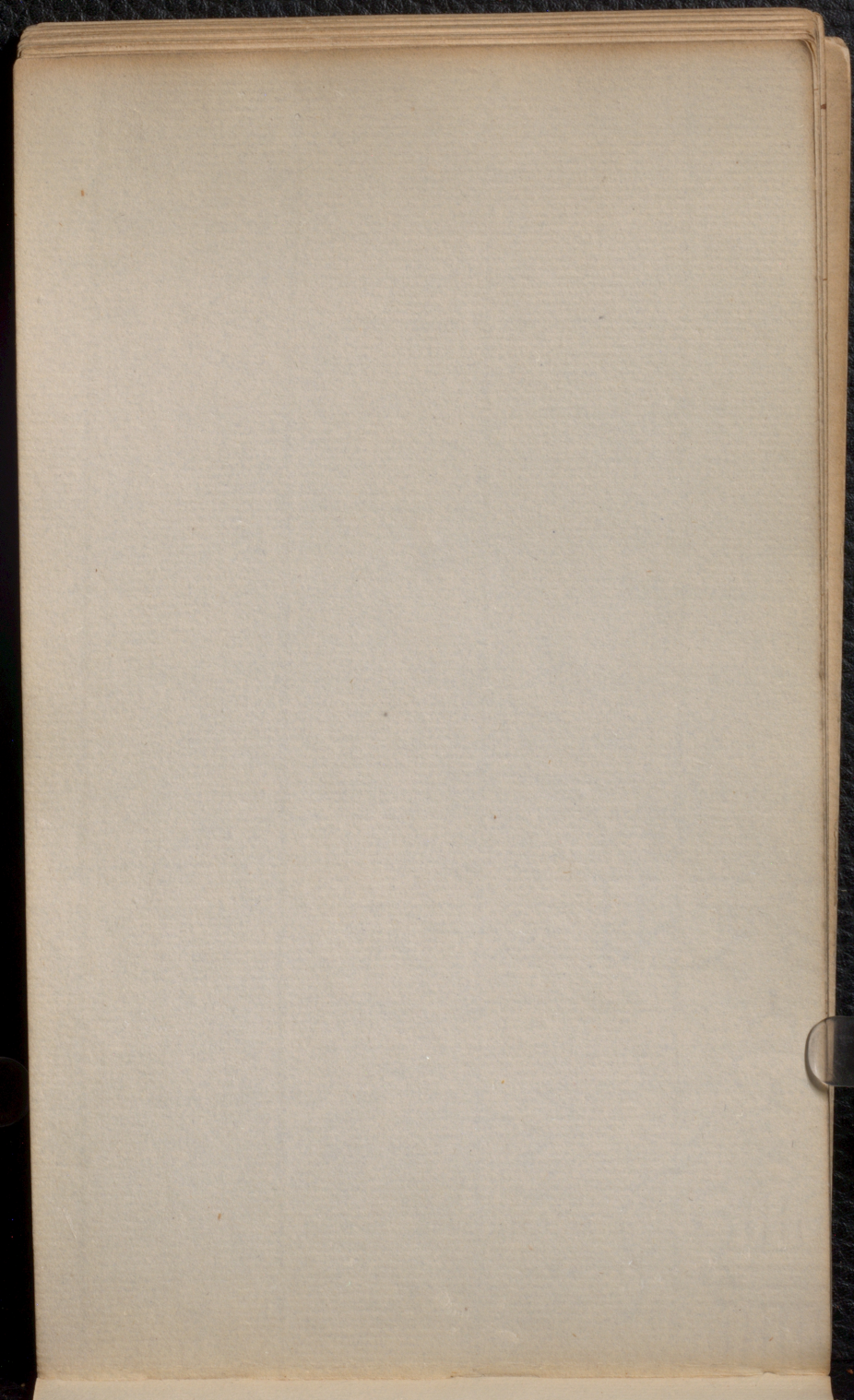
830. This cognizance of y^e cause consists
in y^e examination of y^e merits of y^e proof,
of y^e nature of y^e fact, & y^e qualities of y^e
parties.

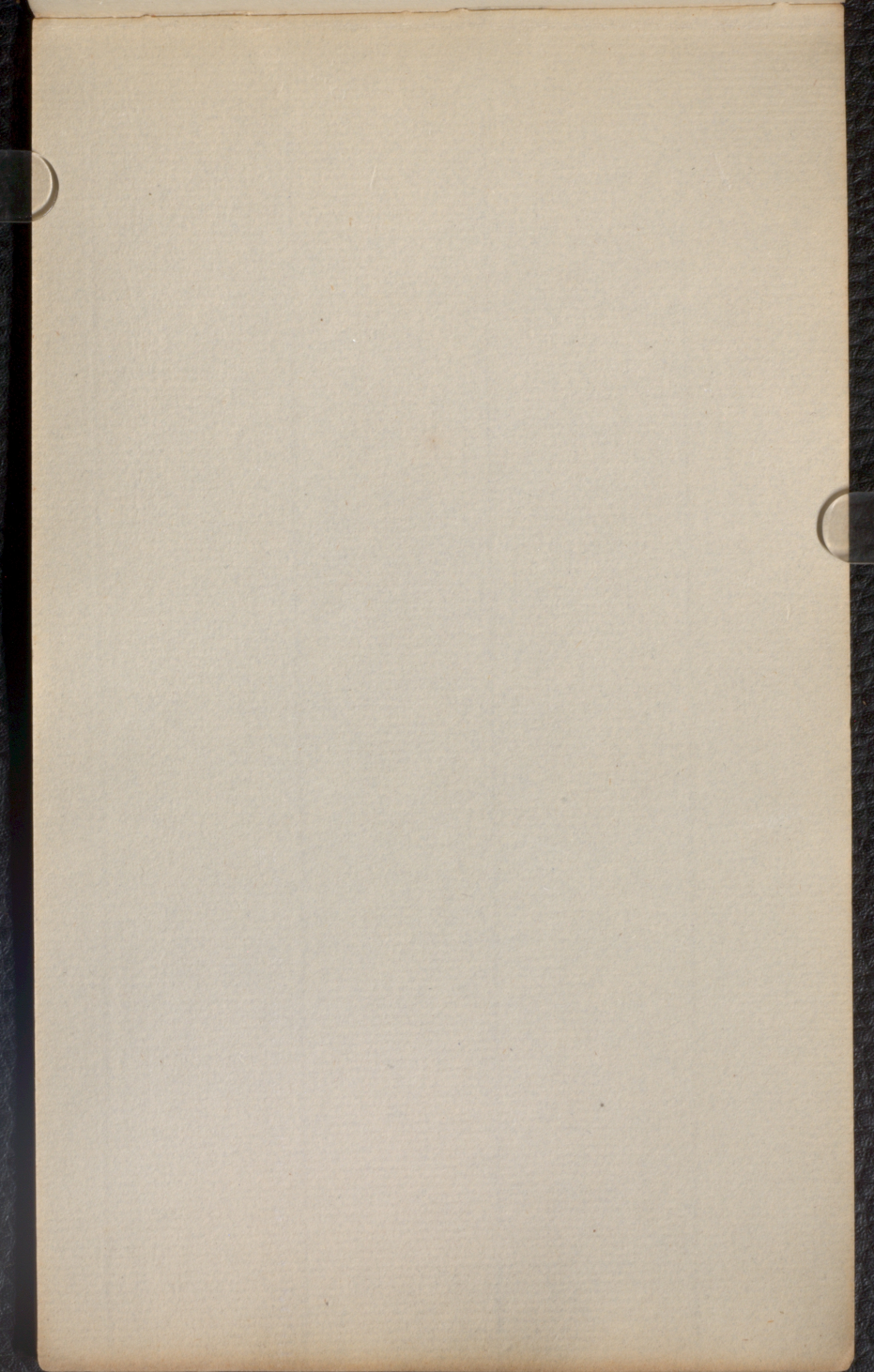
832. The proper case for deciding by
y^e oath of y^e parties is when y^e proof
is already considerable, & not quite complete.

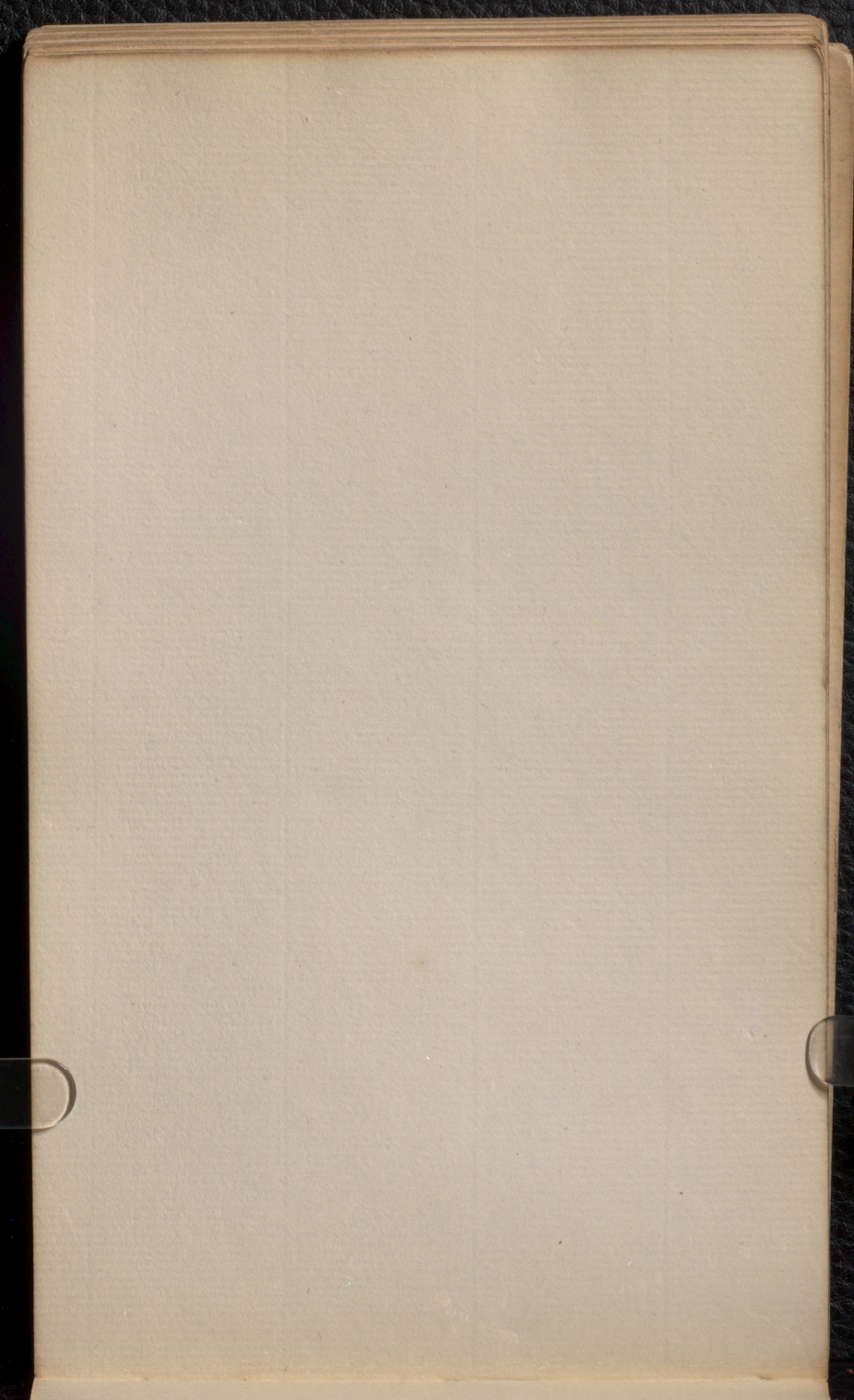
836. The oath called juramentum
in litem, is that which y^e judge defers
to a party, for y^e purpose of fixing &
determining y^e amount of y^e condemna-
tion which he ought to pronounce in his favor.

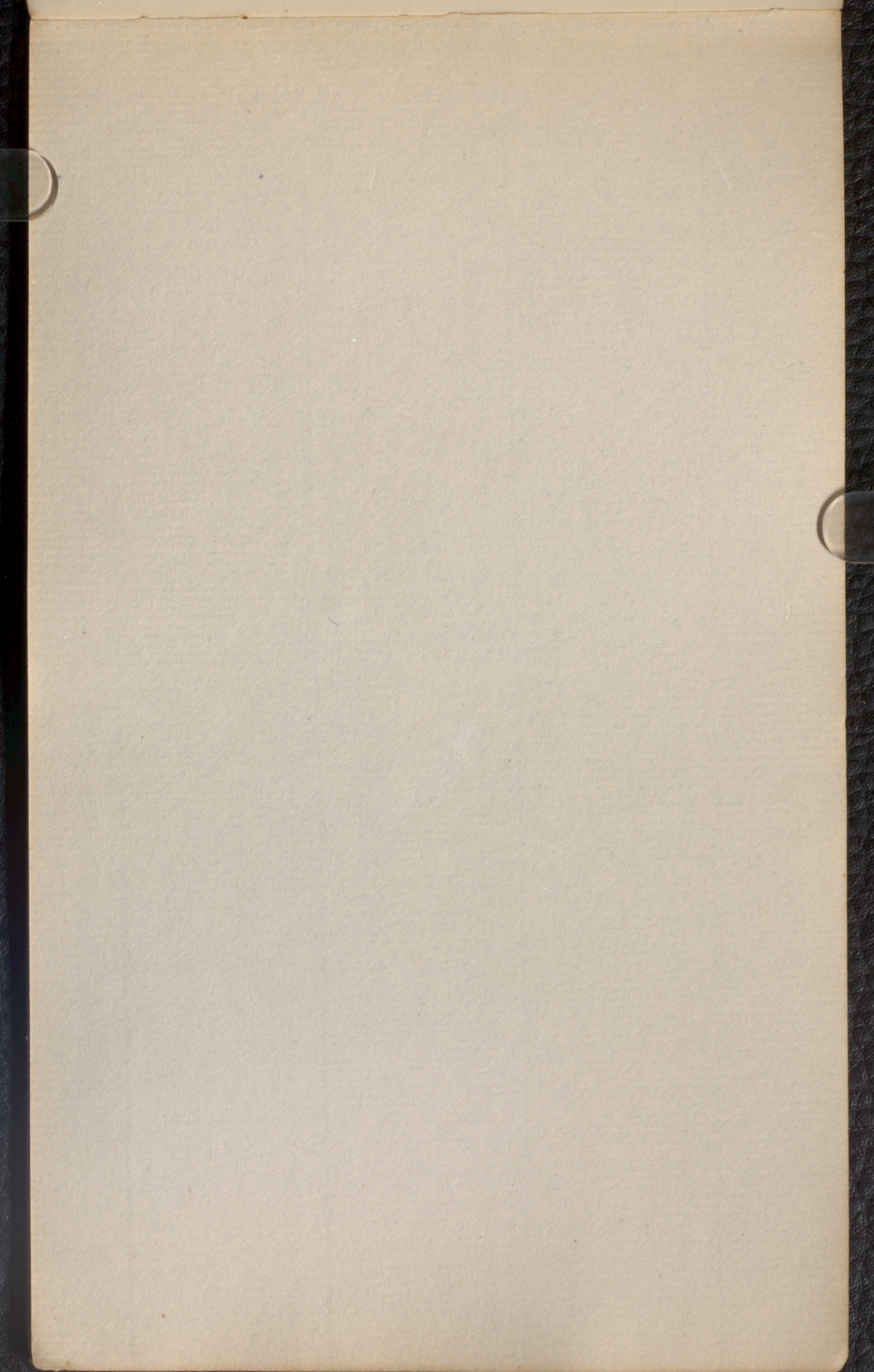
337. This oath (*iuramentum veritatis*)
is administered whenever y^e p^{ty} has
lawfully established his right to y^e
restitution of a thing, & it only remains
to ascertain y^e sum in which y^e def^t
ought to be condemned, for y^e non-restitution
of things, y^e value of which can be
known only to y^e Plaintiff. If y^e judge
in this case decides upon y^e p^{ty}'s
estimate of y^e value, having first
administered y^e oath, that it shall be
fairly & conscientiously made.

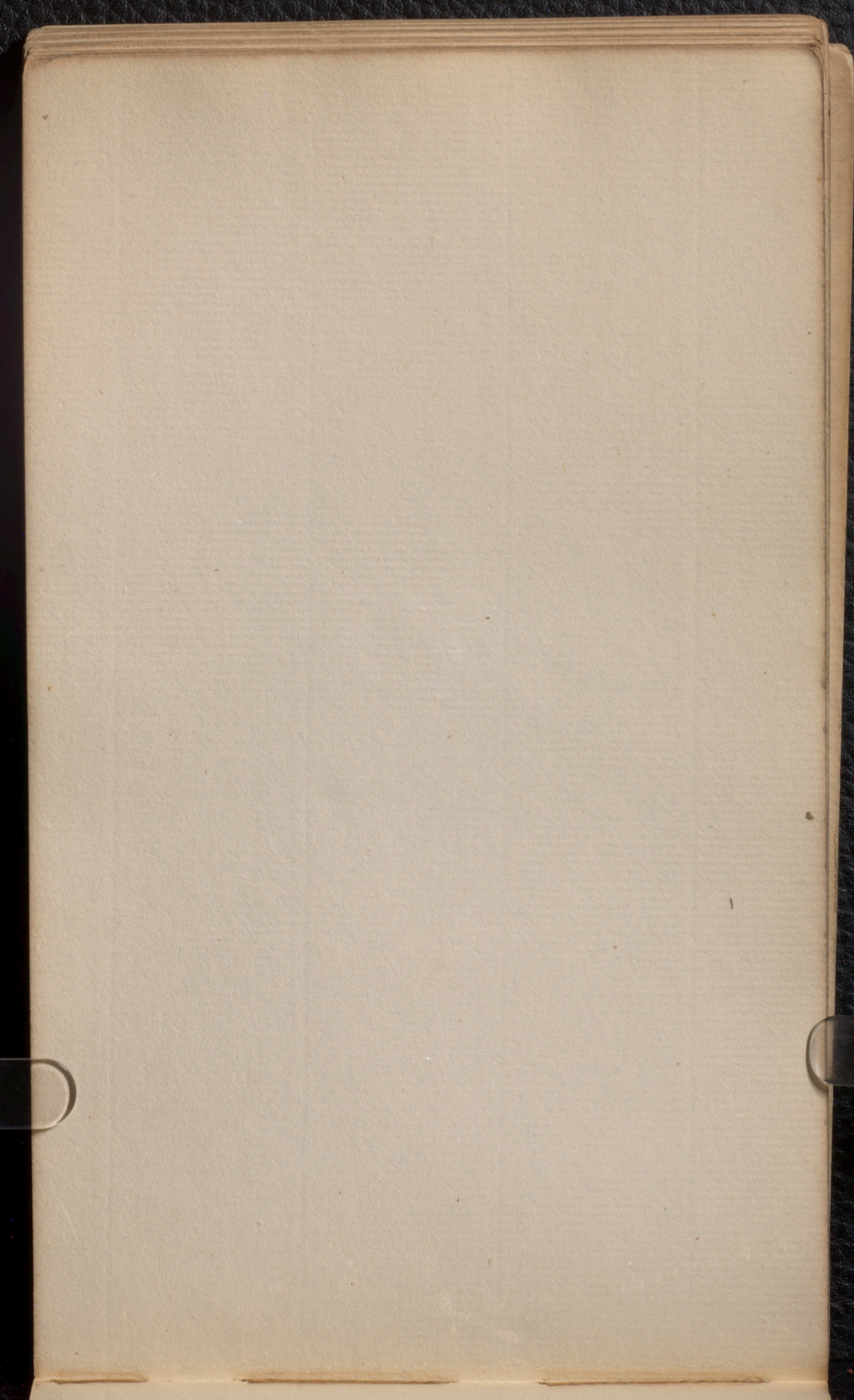


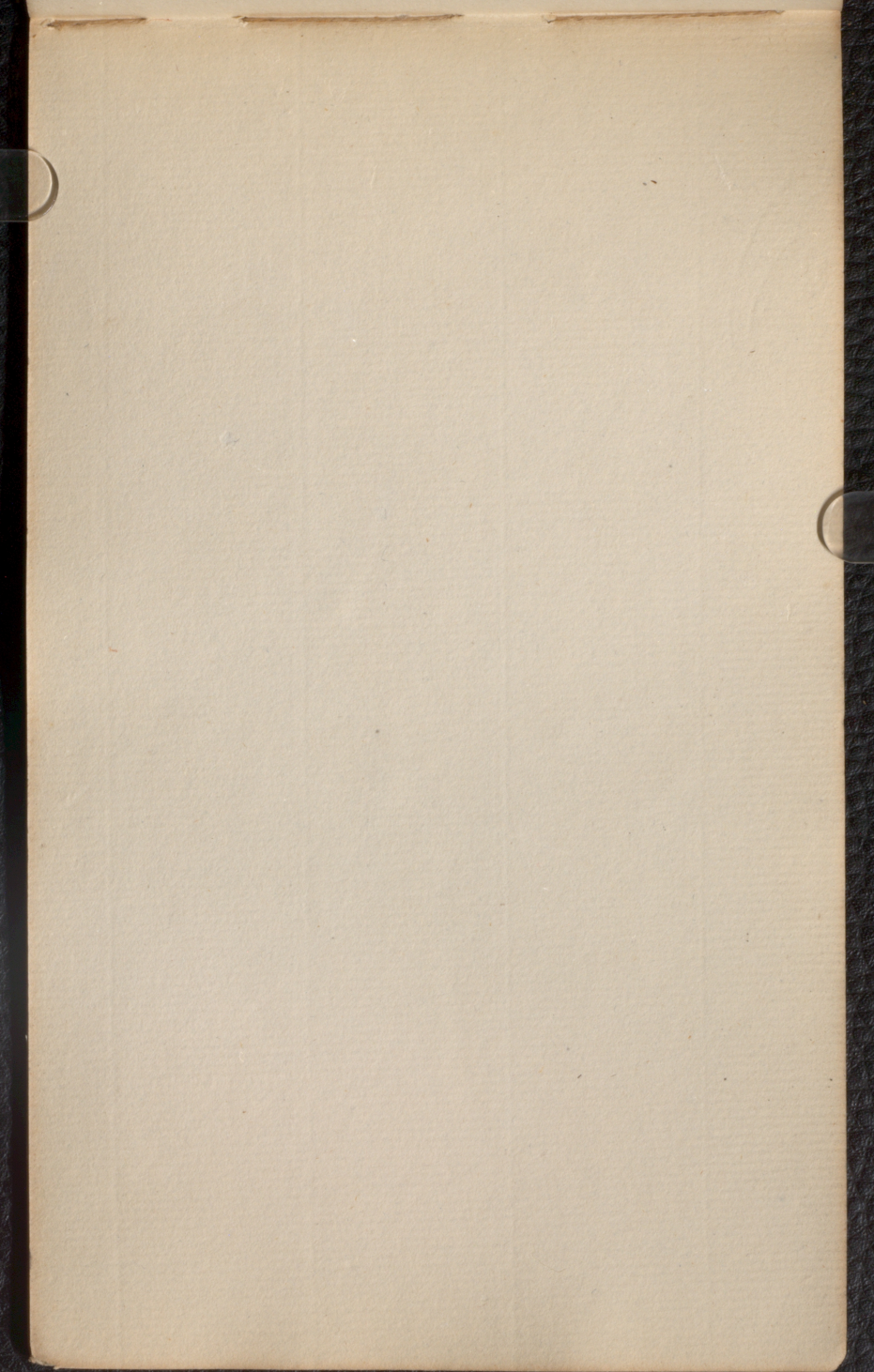


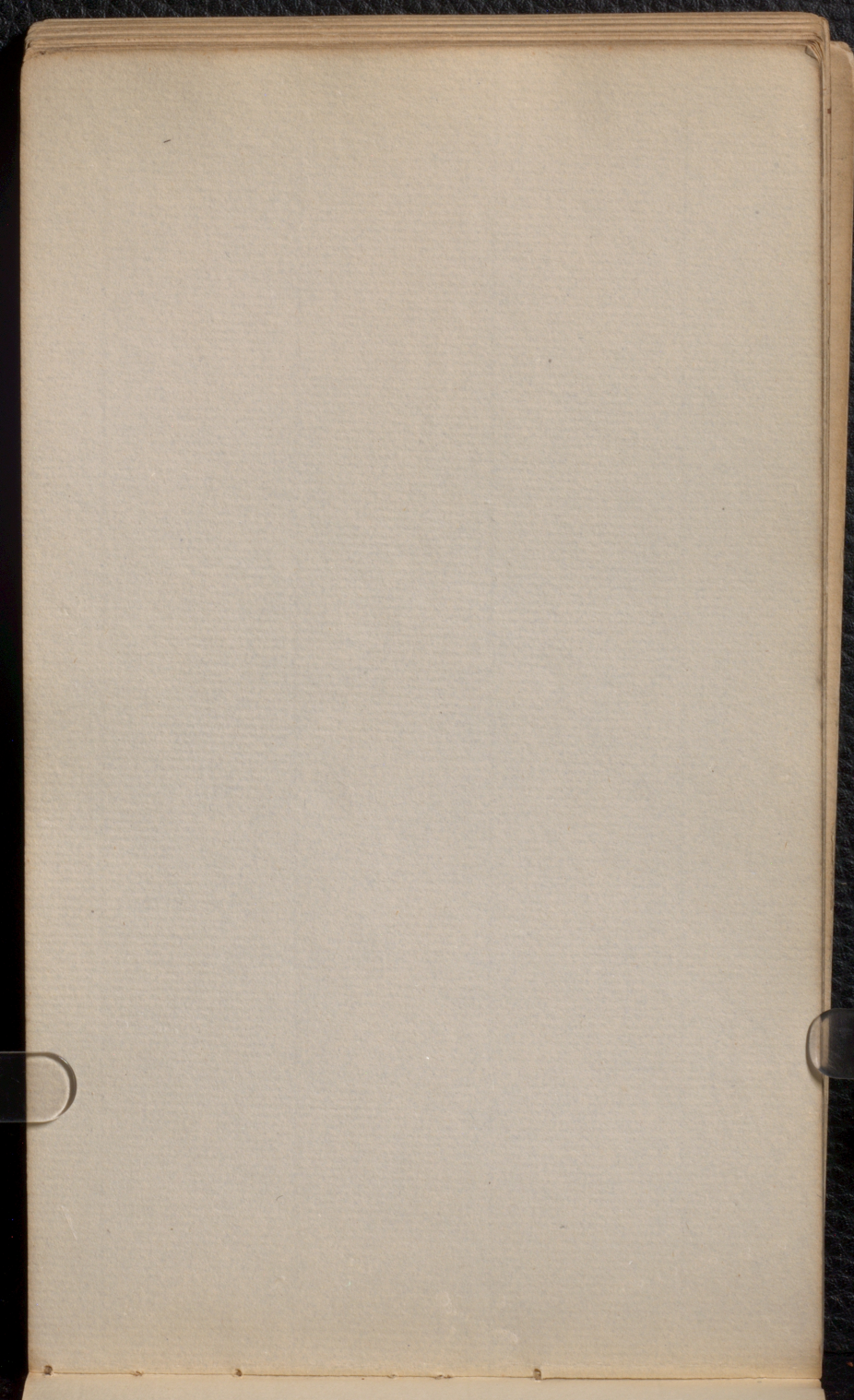


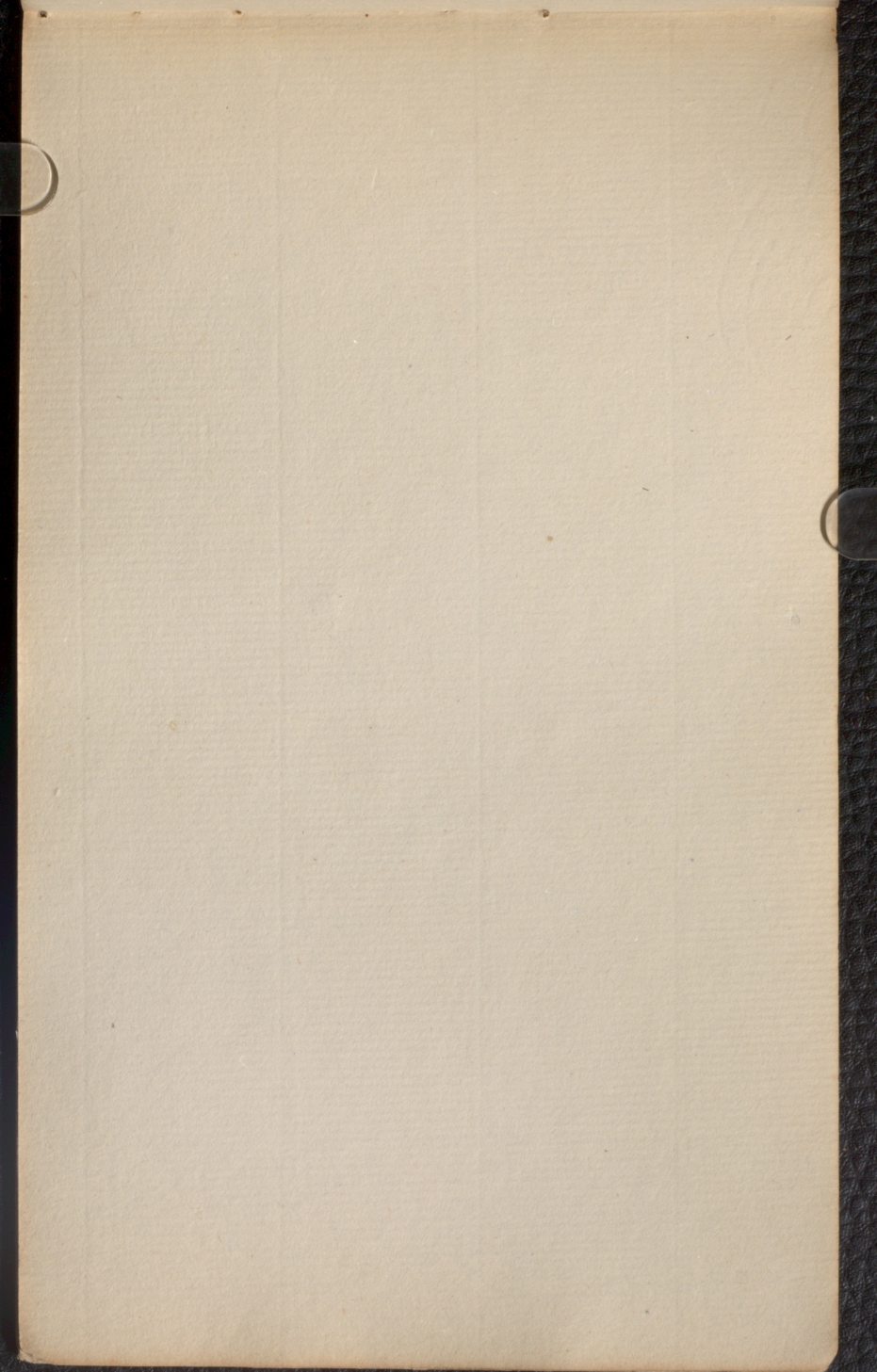


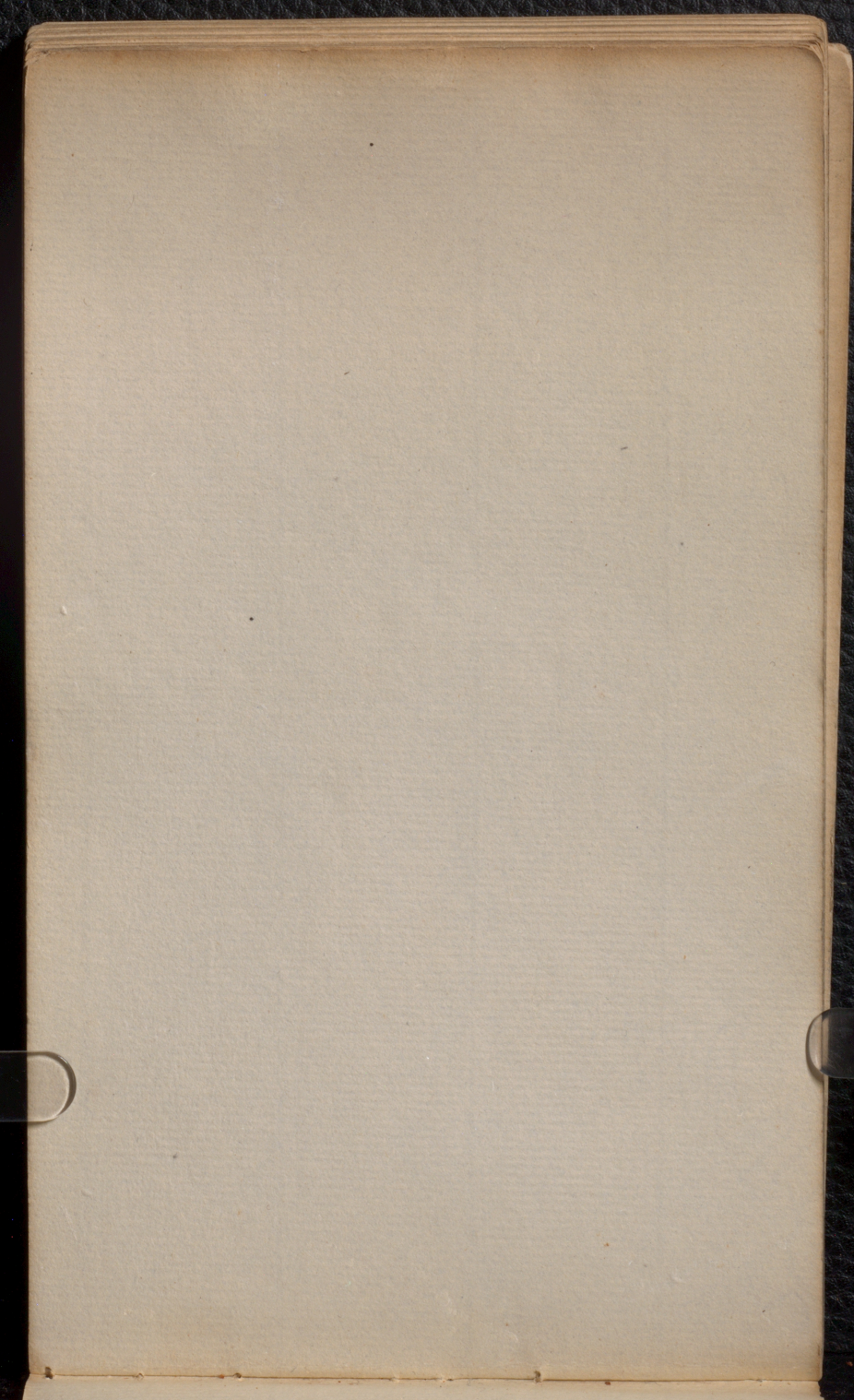


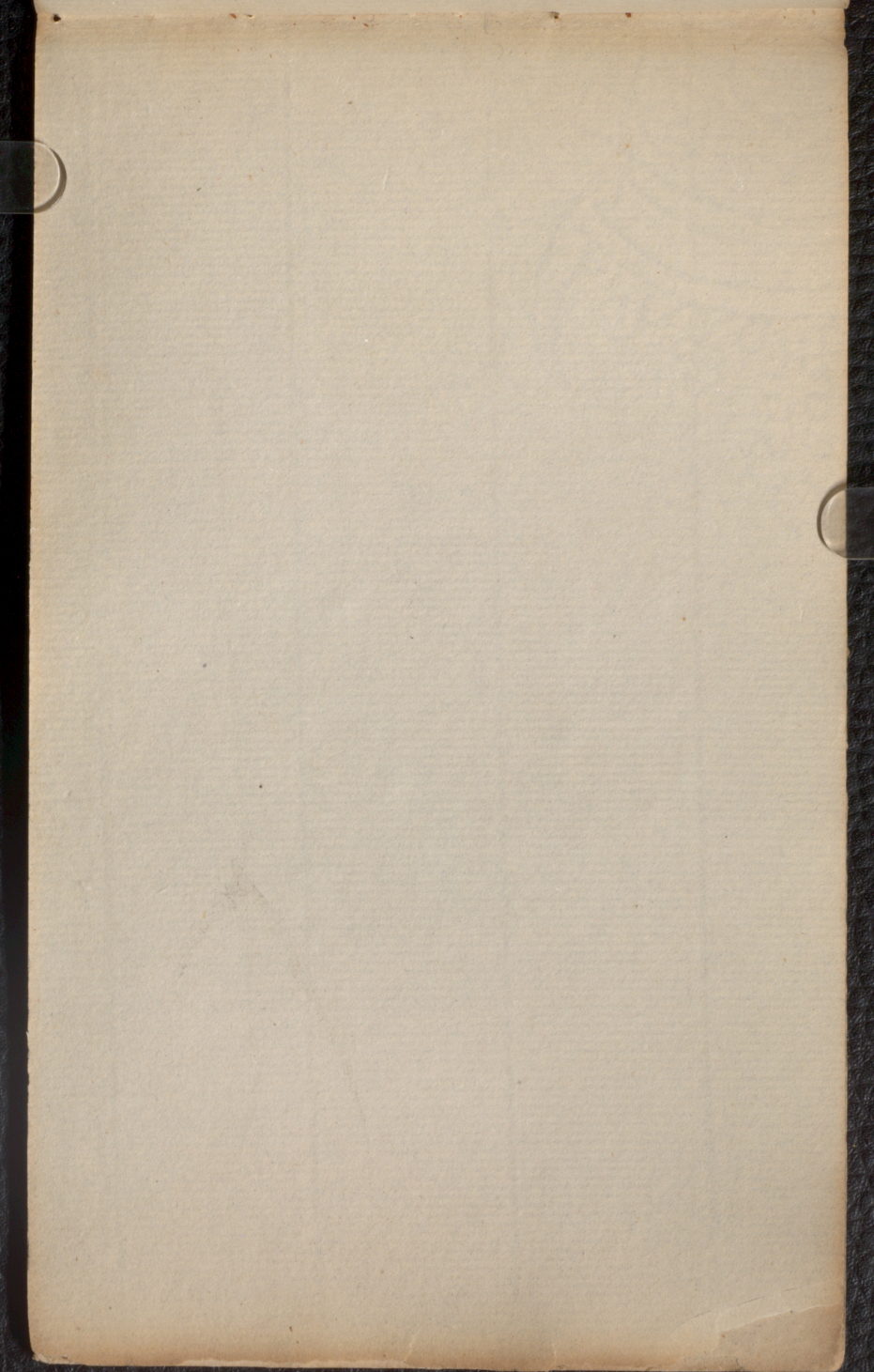














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